Supreme Court, U. S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

80-416

No.

IN THE

Supreme Court of the United States

October Term, 1980

MERCK & CO., INC.,

Petitioner,

v.

ELMER B. STAATS, COMPTROLLER GENERAL
OF THE UNITED STATES

AND

UNITED STATES OF AMERICA

CONDITIONAL PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the narrow access-to-records authority granted to the Comptroller General under 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) for the limited purpose of enabling the General Accounting Office to audit individual government contracts may be employed to demand access to private corporate records for unrelated purposes that were not intended by Congress.

2. Whether a contractor's records relating to its costs, including indirect and unallocated costs, are "directly pertinent" to a government contract, within the meaning of the access-to-records statutes, 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), when the contract price is set at a fixed amount, without reference to the contractor's costs, in accordance with procurement statutes that treat the price established in the public market as the fair price for products purchased by the government.

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CONDITIONAL PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Merck & Co., Inc. conditionally petitions for a writ of certiorari before judgment to review a case pending in the United States Court of Appeals for the District of Columbia Circuit (Nos. 79-1435 and 79-1438). Merck requests that this petition be granted if the Court grants the certiorari petition filed by the Solicitor General on behalf of the Comptroller General and the United States to review a related decision of the Second Circuit, *Staats* v. *Bristol Laboratories Division of Bristol-Myers Co.*, No. 80-264 (filed Aug. 21, 1980).

OPINIONS BELOW

The district court's Memorandum and Order dated August 12, 1977, is unreported (App. C). The court of appeals has yet to issue an opinion.

JURISDICTION

The judgment of the district court was entered on January 24, 1979 (App. B). The Comptroller General and the United States jointly filed a timely notice of appeal on March 14, 1979. Merck filed a notice of cross-appeal on March 21, 1979. The appeal was argued before the United States Court of Appeals for the District of Columbia Circuit on February 11, 1980, and the case remains pending in that court. This Court has jurisdiction to review the case before final judgment in the court of appeals by writ of certiorari pursuant to 28 U.S.C. §§ 1254(1) and 2101(e).

STATUTORY PROVISIONS INVOLVED

Set forth in Appendix A are the pertinent provisions of the statutes involved: Section 4 of the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. § 2313(b); and Section 304 of the Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. § 254(c).

STATEMENT

A. Introduction

This petition involves one of five related cases commenced in five districts and four circuits that have challenged the lawfulness of identical notices served by the Comptroller General in August 1974. The notices demand

that Merck and five other pharmaceutical companies permit the Comptroller General to examine the companies' records reflecting their costs of doing business. This case and the other related cases generated by these demands raise several important statutory questions about the purpose for which the access-to-records authority contained in 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c) may be employed and about the nature of the records that fall within the carefully circumscribed access authority granted by Congress.

The Solicitor General has recently filed a petition for a writ of certiorari in one of these related cases. *Staats* v. *Bristol Laboratories Division of Bristol-Myers Co.*, No. 80-264 (filed Aug. 21, 1980). Merck is filing this conditional petition because the *Bristol* case presents the statutory issues in an artificially truncated form. We understand that, for similar reasons, a conditional petition is also being filed by SmithKline Corporation seeking review of another related case, which is pending in the Third Circuit.

B. Origin Of The Comptroller General's Demands

The Comptroller General's demands for access to cost and pricing records from Merck, Bristol, SmithKline and three other drug companies are the product of efforts by two Senators and their staff aides to secure raw cost data on individual pharmaceutical products. These efforts originated in January 1971 during hearings on competition in the pharmaceutical industry. At the hearings, Senator Gaylord Nelson suggested that the Comptroller General invoke the access-to-records clauses contained in most government procurement contracts in order to "take a look at" the costs incurred by pharmaceutical companies.[1]

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[1] *Hearings on Competitive Problems in the Drug Industry Before the Subcommittee on Monopoly of the Senate Select Committee on Small Business*, 92d Cong., 1st Sess. 8020 (1971).

Despite the Comptroller General's judgment that the government was protected against unreasonable drug prices by competitive market forces and that data for individual drug items might well prove meaningless, Senator Nelson, Senator Edward M. Kennedy, and their staff assistants pressed the General Accounting Office to assert the access-to-records provisions to obtain raw cost data on individual drug products. (C.A. App. 231-32, 474-77).[2] The pressure from these two Senators and their staffs, overriding the judgments and proposals of the Comptroller General's staff in the General Accounting Office, continued through the service of the access demands in 1974. (C.A. App. 311-18).

GAO initially responded to this pressure by proposing a broad-ranging, two-phase study of the economics of the pharmaceutical industry. Based on knowledge to be gained during phase I, GAO planned to design a comprehensive study of the industry to be carried out in phase II. (C.A. App. 93-94, 105-09). Merck, Bristol, SmithKline and three other companies voluntarily stepped forward and agreed to participate in the first phase of the GAO study on the explicit understanding that it would not entail review of sensitive cost records pertaining to specific products. (C.A. App. 93).

After the companies participated in that extensive background study, GAO in March 1974 issued a proposal for its phase II study, stating that the objective of this study was "to gather and develop data necessary to make" a "presentation concerning salient economic and operational aspects of the industry." (C.A. App. 380). Merck and the other companies that participated in phase I were willing to proceed with phase II but expressed reservations about aspects of the proposed study that would have

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[2] References in the form "C.A. App." are to the joint appendix filed by the parties in the court of appeals.

required them to give GAO access to highly confidential cost and pricing data without adequate assurances of confidentiality. (C.A. App. 94-95, 126-27). GAO was prepared to give those assurances because they would not interfere with the preparation of a general economic study of the industry. (C.A. App. 309-10, 312-15).

The two Senators who had prompted the proposed GAO study, however, refused to let the Comptroller General provide such assurances, since the Senators were "primarily interested in the cost data from individual companies." (C.A. App. 317). As a result, the companies declined to participate in the study. (C.A. App. 312-16). The Comptroller General reacted on August 26, 1974, by issuing formal access-to-records demands to the six companies that had voluntarily come forward to participate in the phase I study. (C.A. App. 49-50, 481).

C. Nature Of The Contracts Involved In This Case

The Comptroller General's demand letter sought access to Merck's records pertaining to four 1973 government contracts for prescription drugs. (C.A. App. 51). GAO selected the four Merck contracts at random from among the government's negotiated procurement contracts with Merck. (C.A. App. 215). Each of the contracts, pursuant to 10 U.S.C. § 2313(b) or 41 U.S.C. § 254(c), incorporated by reference a standard form clause granting the Comptroller General access to "directly pertinent . . . records . . . involving transactions related to this contract." (App. C at 2c).

The pharmaceutical products covered by the contracts were standard commercial items sold by Merck in substantial quantities in the public market. (C.A. App. 462). Each of the four contracts was a fixed-price rather than a cost-based contract. (C.A. App. 463). The price proposed by Merck for each contract was based on the "catalog price" at which Merck sold the item to the

general public or was otherwise determined by adequate price competition. (C.A. App. 462-63).

In each instance, the price paid by the government was the lowest price at which Merck sold the product to anyone at the time the contracts were awarded. (C.A. App. 462-63). There was no actual negotiation of the price prior to the award of any of the contracts. The contracting officers did not ask for any cost or pricing data, and none were submitted by Merck. (C.A. App. 462). Merck's costs were legally irrelevant to the negotiation and performance of the contracts, because in each instance the contracting officers found present the existence of competitive factors that the procurement statutes and regulations recognize as indicating "the basic reasonableness of the price." (C.A. App. 206-07, 464).

GAO has acknowledged that its access-to-records demands were not made in order to audit Merck's contracts and that it does not suspect any impropriety by Merck or the contracting officers in connection with these contracts. (C.A. App. 144-46). GAO also has conceded that it does not question the reasonableness of any of the prices charged. (C.A. App. 142, 216).

D. Scope Of The Records Demanded

The Comptroller General has made a sweeping demand for access to Merck's records. The demand covers, but is not limited to, all records of the company's "experienced costs," all records that "support the prices charged to the Government," and "such other information that the GAO believes is necessary" to allow it to review "the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interest." (C.A. App. 11). All this is demanded under statutes allowing access only to those records that are "directly pertinent" to transactions involving a specific contract. The demand for voluminous cost records rests upon four

competitively priced contracts for which the prices were not negotiated and in which the contractor's costs were not an issue.

GAO asserts that it is entitled to examine company records concerning any costs that might "affect the price" quoted for the drugs supplied to the government, no matter how remote or tenuous the connection. (C.A. App. 155-56). These records might encompass virtually all of Merck's costs of doing business since, in the government's view, almost any cost incurred by a contractor affects each price that must be charged to purchasers to recover all of the contractor's expenses and to generate a profit. (C.A. App. 329-38). *See Staats* v. *Bristol* Pet.(No. 80-264) at 12. Indeed, GAO has been unable to define *any* category of Merck's records that would fall outside the scope of its access demand, including records relating to costs that were incurred twenty years ago and that were never allocated to products of the kind sold under the four contracts involved in this case. (C.A. App. 156, 329-38, 346-47, 351-54).

E. Proceedings Below

On October 2, 1974, Merck commenced this action in the United States District Court for the District of Columbia seeking a declaratory judgment that the Comptroller General's demand for access to Merck's records exceeded his statutory authority. (C.A. App. 5-8). The United States subsequently intervened as a defendant and counterclaimed for an injunction enforcing the Comptroller General's demand. (C.A. App. 21-27).

Following discovery, the parties filed cross-motions for summary judgment. Merck contended that the Comptroller General's access demand was unlawful (1) because it was issued for an unauthorized purpose, not to enable GAO to conduct audits of the particular contracts listed in

the demand letter (C.A. App. 456), and (2) because, in any event, records of costs, especially unallocated costs, are not "directly pertinent" to the four non-cost based contracts that were the predicate of the GAO demand. (C.A. App. 457).

Although the government conceded that the access demand was not part of a contract audit, the district court did not determine the actual purpose underlying the demand. Instead, the court simply concluded that it was "satisfied that the survey proposed by the Comptroller in this case . . . will facilitate supervision of the procurement process and is within his authority." (App. C at 4c).

On the other issue, the nature of the documents that are properly subject to an access demand, the district court took an intermediate position. With respect to Merck's claim that no cost records are "directly pertinent" to the four contracts, the court concluded that direct manufacturing and overhead costs in producing the specific drug items procured by the government are "directly pertinent" to the contracts. (App. C at 6c). The court also held, however — relying on the district court decision in the *Bristol* case — that the Comptroller General has no right to examine Merck's records "with respect to research and development, marketing and promotion, distribution, and administration" costs since those records are not "directly pertinent" to the contracts. (App. C at 6c).

Both the government and Merck cross-appealed to the United States Court of Appeals for the District of Columbia Circuit. The appeal was argued on February 11, 1980, and the case remains pending.

REASONS FOR GRANTING THE WRIT

A. This Petition Is Conditioned Upon The Court's Decision Whether To Act Now To Resolve An Acknowledged Conflict In The Circuits.

The identical access-to-records demands served by the Comptroller General in August 1974 have generated litigation in four circuits. The two circuits that have rendered decisions in these related cases have adopted conflicting interpretations of the statutory provisions that must be included in virtually all negotiated government procurement contracts. *Compare Bristol Laboratories Division of Bristol-Myers Co.* v. *Staats*, 620 F.2d 17 (2d Cir. 1980), *petition for cert. pending*, No. 80-264, *with United States* v. *Abbott Laboratories*, 597 F.2d 672 (7th Cir. 1979), *and Eli Lilly & Co.* v. *Staats*, 574 F.2d 904 (7th Cir.), *cert. denied*, 439 U.S. 959 (1978).[3]

In addition to the *Bristol* case now before the Court on the Solicitor General's petition, the two remaining cases are presently pending in other circuits — one, the action brought by Merck that is the subject of this petition, is before the District of Columbia Circuit; and the other, involving SmithKline Corporation, is before the Third Circuit. *Merck & Co.* v. *Staats* (D.C. Cir. Nos. 79-1435, 79-1438, argued February 11, 1980); *SmithKline Corp.* v. *Staats* (3d. Cir. No. 80-1464, filed March 19, 1980).

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[3] The Seventh Circuit itself is sharply divided over the issues presented in this controversy. As the Second Circuit noted in *Bristol*, 620 F.2d at 118:

> "not only was there a vigorous dissent in *Lilly*, see 574 F.2d at 918 (Pell, J., dissenting), but also the precedential force of that decision has been weakened by the reluctant concurrences of two members of the *Abbott* panel, see 597 F.2d at 674 (Pell, J., concurring), 675 (Wood, J., concurring)."

Merck has filed this petition for a writ of certiorari before judgment to enable this Court to resolve the important issues presented by these closely related cases. The petition is expressly conditioned on the Court's decision to grant the Solicitor General's petition in *Bristol*. Merck recognizes that the Court may choose to deny review in that case in order to await decisions by the District of Columbia Circuit and the Third Circuit in these related cases, since they provide a more comprehensive factual record and present a more complete set of statutory issues than does *Bristol*. That course would not prejudice the Comptroller General, since it is our understanding that the GAO will not attempt to enforce any access rights until all these related cases are resolved by a uniform judicial interpretation, if that is possible.

If the Court decides to grant review in the *Bristol* case, Merck submits that, for the reasons set forth below, the Court should grant this petition as well.

B. Review Of This Case Would Be Required For Complete Resolution Of The Issues Presented By These Related Cases.

The Solicitor General has petitioned for review in *Bristol* in order to resolve the circuit conflict generated by these closely related cases and to avoid encouraging "further litigation in other circuits." *Staats* v. *Bristol* Pet. at 9. The *Bristol* case, however, is not suitable as the exclusive vehicle for fully airing and finally determining the important issues presented by these cases.

1. The *Bristol* case does not pose the question whether the Comptroller General exceeds his statutory access right when he asserts it for a purpose other than to conduct a *bona fide* contract audit. Both the *Merck* case and the *SmithKline* case, by contrast, urge that the Comptroller

General may not use this statutory power either to gather private cost data for individual congressmen or to conduct general studies of industry economics or procurement techniques.

Unlike the other four pharmaceutical companies that challenged the legality of the Comptroller General's access-to-records demands, Bristol alone agreed to provide GAO with some records in response to the GAO demand — records relating to its manufacturing costs, manufacturing overhead, royalty expenses, and delivery costs. Bristol chose to focus its objections exclusively on whether other cost records sought by the Comptroller General were "directly pertinent" to the contracts involved in that case.

The limited focus of the *Bristol* case raises the real prospect that a decision by this Court in that case alone would not resolve the overall controversy created by the 1974 demands and the events leading up to them. The broader statutory issue involves the authority of the Comptroller General to employ the access-to-records provisions for a purpose other than to audit particular procurement contracts. Although not presented in *Bristol*, that issue is currently before the District of Columbia Circuit and the Third Circuit, and it sharply split the Seventh Circuit. *See Eli Lilly & Co.* v. *Staats*, *supra*, 574 F.2d at 918, 924. The decision in favor of the government on that issue by the divided panel in the *Lilly* case has been the subject of sharp criticism from scholars; it rested on a legal theory that has never been advanced by the Comptroller General, and even today is not embraced by the government.[4]

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[4] In upholding the Comptroller General's use of his access-to-records authority to gather corporate data for the proposed GAO economic study, the *Lilly* majority relied upon three

(*footnote continues*)

The *Merck* and *SmithKline* cases present the important statutory issue concerning the purposes for which the Comptroller General may lawfully invoke his access-to-records rights. Cases in comparable contexts establish that government agencies may use similar investigative powers only for the purposes for which Congress granted those powers.[5] Reflecting the limited nature of the question presented in *Bristol*, the government's petition in that case does not refer to this issue or even mention the origin of the access demand challenged in that case. *Compare Staats* v. *Bristol* Pet. at 3-4 *with* pp. 3-5, *supra*. The *Bristol* case, therefore, would be heard in a vacuum unless the Court also considers the closely related "unlawful purpose" issue.

(*footnote continued*)

statutes, 31 U.S.C. §§ 53, 60 & 65. Those statutes, however, are general provisions delineating the responsibilities of the GAO in overseeing *government* operations and granting the Comptroller General powers of investigation only with respect to *government* records.

The *Lilly* decision has been attacked in scholarly commentary. *See* Comment, *The Comptroller General's Authority to Examine the Private Business Records of Government Contractors: Eli Lilly & Co. v. Staats*, 92 Harv. L. Rev. 1148 (1979); Note, *Eli Lilly & Co. v. Staats: An Undue Expansion of the GAO's Investigatory Power Under the Access-to-Records Statutes*, 74 Nw. L. Rev. 122 (1979).

[5] *See, e.g., United States* v. *LaSalle National Bank*, 437 U.S. 298, 316-17 (1978); *United States* v. *Humble Oil & Ref. Co.*, 488 F.2d 953, 962-63 (5th Cir. 1974), *vacated and remanded*, 421 U.S. 943, *reaffirmed*, 518 F.2d 747, 748-49 (5th Cir. 1975); *Burlington Northern, Inc.* v. *ICC*. 462 F.2d 280, 286-88 (D.C. Cir.), *cert. denied*, 409 U.S. 891 (1972); *cf. United States* v. *Frontier Airlines Inc.* 563 F.2d 1008 (10th Cir. 1977); *CAB* v. *United Airlines Inc.*, 542 F.2d 394 (7th Cir. 1976).

2. Similarly, the *Bristol* case does not frame the other significant issue raised by these related cases — whether *any* cost records are "directly pertinent" to non-cost based contracts within the meaning of the access-to-records statutes. That issue, too, sharply divided the Seventh Circuit and is pending in the *Merck* and *SmithKline* cases.[6] The Second Circuit's decision in *Bristol* assumes that *some* cost records are "directly pertinent," since Bristol did not contest that construction of the statute. Merck and SmithKline, however, are asking the District of Columbia Circuit and the Third Circuit to rule that no cost records are "directly pertinent" to their non-cost based contracts.

Thus, a decision by this Court in *Bristol* affirming the Second Circuit decision in that case may not comprehensively resolve this underlying question of statutory interpretation. Thousands of contractors who enter into government contracts that must contain the standard form access-to-records clause deserve to know just how sweeping are the rights they are compelled to grant as the price for doing business with the government. The Court should not endeavor to settle that issue solely in a case in which neither side will be arguing an interpretation of the access statutes that other government contractors are actively urging and that is of general importance to the participants in the federal procurement process.

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[6] Judge Pell, in dissent in *Lilly*, endorsed the conclusion of the district court that the cost records sought by the Comptroller General were not directly pertinent to the contracts involved in that case. 524 F.2d at 918. The district court had explained this aspect of its holding as follows:

> "Since each of the contracts was a fixed-price contract awarded to Lilly solely on the basis of competitive bids received or a comparison of Lilly's offered price with its standard catalog price, and since each contract was exempt from the Truth-In-Negotiations Act and Renegotiation Act, neither the negotiations nor performance terms of the contracts were in any way dependent upon, or directly related to, Lilly's costs . . . ." 574 F.2d at 925.

C. Concurrent Review In This Case Would Assist The Court In Addressing The Limited Issue Presented In *Bristol*.

Review in this case would also assist the Court in addressing even the narrow issue presented in the *Bristol* case.

1. For example, the government in its petition in *Bristol* acknowledges that the legislative history of the access-to-records provision is critical to assessing the range of records that are "directly pertinent" to the contracts involved in that case. *Staats* v. *Bristol* Pet. at 10-11. While the legislative history of the provision has received limited attention in the *Bristol* case to date, it has been explored extensively by Merck in this case. That examination has shown that the access-to-records statutes at issue here are derived directly from an emergency Korean War measure designed solely to permit GAO to conduct individual contract audits in order to deter fraud and abuse by contractors and to check the actions of government contracting officers in the negotiation of cost-based contracts.[7] The current permanent statutes were intended to achieve the same carefully focused objective. In pressing its expansive interpretation, the government's petition in *Bristol* omits this and other central aspects of the legislative history of the access-to-records statutes.[8]

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[7] *See* 1951 amendment to the First War Powers Act, 64 Stat. 1257; H.R. Rep. No. 3227, 81st Cong., 2d Sess. 3-4 (1950); S. Rep. No. 2686, 81st Cong., 2d Sess. 2 (1950); 96 Cong. Rec. 17123 (1951)(remarks of Rep. Celler); 97 Cong. Rec.12611, 13198, 13199, 13200 (1951)(remarks of Rep. Hardy).

[8] The Comptroller General acknowledged the origins of the access-to-records statute as well as its limited scope and purpose in the contemporaneous interpretation provided to both Houses of Congress during their consideration of the access-to-records legislation. *See* H.R. Rep. No. 791, 82nd Cong., 1st Sess. 4-5 (1951); S. Rep. No. 603, 82nd Cong., 1st Sess. 3-4 (1951).

2. Similarly, the government's petition in *Bristol* asserts that the access demands in these cases reflect a consistent GAO construction of the access-to-records statute in which Congress has acquiesced. *Staats* v. *Bristol* Pet. at 14-17. Discovery taken in this case, however, but not in *Bristol*, uncovered internal GAO memoranda and opinions showing that the access demands challenged in these related cases are actually an unprecedented use of the access-to-records statute. (C.A. App. 488-89). The record in the present case demonstrates that, until these access demands, GAO had used its access authority exclusively to conduct audits of individual contracts. (C.A. App. 147, 148, 248-81). Internal GAO opinions and rulings regularly denied that the access right could be used to compel contractors to participate in other kinds of studies.

Moreover, far from acquiescing in a broad interpretation of the GAO's statutory authority, Congress has carefully confined GAO's visitorial powers and has protected private companies from undue intrusion into their sensitive records. On the only occasion in which Congress granted the GAO the right to demand access to the records of government contractors for the purpose of conducting an economic study, Congress limited the Comptroller General to a single, one-year study of defense contractors. *See* Military Appropriations Act of 1970, P.L. 91-121, § 408, 83 Stat. 208; 115 Cong. Rec. 25793 (remarks of Sen. Proxmire), 25795 (1969)(remarks of Sen. Ribicoff). In 1973 and again in 1975, Congress rejected GAO-drafted proposals that would have authorized GAO to demand access to contractors' records in order to conduct profit studies of major government contractors. *See* S. 2049 and S. 3014, 93d Cong., and S. 2268, 94th Cong.

3. Concurrent review in this case also would provide a different perspective on important arguments presented by the parties in *Bristol*. For example, in the Second

Circuit, both Bristol and the government placed considerable emphasis on the interpretation of the Ninth Circuit decision in *Hewlett-Packard Co.* v. *United States*, 385 F.2d 1013 (9th Cir. 1967), *cert. denied*, 390 U.S. 988 (1968). While *Hewlett-Packard* supports the conclusion reached by the Second Circuit in *Bristol*, Merck submits that the decision in *Hewlett-Packard* was in error in concluding that any cost records are "directly pertinent" to non-cost based contracts of the type involved in these related cases. There is judicial and scholarly support for Merck's position that this aspect of *Hewlett-Packard* deserves no weight at all.[9] Merck's participation, therefore, would assist this Court by presenting it with a more complete range of arguments on the statutory issues.

D. Certiorari Before Judgment Is Appropriate.

The Court on a number of occasions has granted similar pre-judgment petitions in connection with its review of related cases or of cases presenting similar issues. *See, e.g., Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 674 (1979); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12 & n.1 (1963); *Hannah* v. *Larche*, 363 U.S. 420, 422-23 & n.3 (1960); *Taylor* v. *McElroy*, 360 U.S. 709, 710 (1959); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946). For example, one of the three petitions granted last Term in the *Washington Fishing Vessel* case (No. 79-139) sought certiorari before judgment to review a district court order that was pending in the Ninth Circuit. The Court granted review of that petition as well as of

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[9] This aspect of the *Hewlett-Packard* decision rests on a tortured reading of the access-to-records statute that has never been advanced by the government and that others have derided. *See, e.g., Eli Lilly & Co.* v. *Staats, supra*, 574 F.2d at 918-19 (Pell, J., dissenting); Note, *Eli Lilly & Co.* v. *Staats: An Undue Expansion of the GAO's Investigatory Power Under the Access-to-Records Statutes*, 74 Nw. L. Rev. 122, 130-31 (1979).

related post-decision petitions in order to resolve the entire controversy presented by cases coming up from two lower courts. *See* 443 U.S. at 674. The present petition arises in a similar setting.

Certiorari before judgment is particularly appropriate here. This case arises out of the same government action as *Bristol* and presents similar legal issues. A decision to grant review in circumstances like those presented here does not deprive this Court of the benefit of the views of the court of appeals, since there are already several related but dissonant appellate decisions. Unlike most situations involving related cases, *amicus* participation would not suffice to serve the needs of the Court or the interested parties if the Court grants review in *Bristol*. The limited content of the record and the narrower statutory arguments presented by the parties in *Bristol* would make it awkward, if not impossible, for this Court to address the fundamental statutory issues presented by these related cases. The interests of judicial economy and informed decision-making would justify concurrent review of this case.

CONCLUSION

If the Court grants the Solicitor General's petition in *Staats* v. *Bristol Laboratories Division of Bristol-Myers Co.*, No. 80-264, certiorari before judgment should be granted in this case and, under Rule 37.3, the cases should be consolidated for argument or set for argument in tandem.

Respectfully submitted.

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Attorneys for Petitioner
Merck & Co., Inc.

September 1980.

APPENDIX A

Pertinent Statutory Provisions

1. Section 4 of the Armed Services Procurement Act of 1947, as amended, 10 U.S.C. § 2313(b), provides:

> (b) Except as provided in subsection (c), each contract negotiated under this chapter shall provide that the Comptroller General and his representatives are entitled, until the expiration of three years after final payment, to examine any books, documents, papers, or records of the contractor, or any of his subcontractors, that directly pertain to, and involve transactions relating to, the contract or subcontract.

2. Section 304 of the Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. § 254(c), provides:

> (c) All contracts negotiated without advertising pursuant to authority contained in this Act shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall until the expiration of three years after final payment have access to and the right to examine any directly pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts. Under regulations to be prescribed by the Administrator, however, such clause may be omitted from contracts with foreign contractors or foreign subcontractors if the agency head determines, with the concurrence of the Comptroller General of the United States or his designee, that the omission will serve the best interests of the United States. However, the concurrence of the Comptroller

General of the United States or his designee is not required for the omission of such clause—

(1) where the contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, documents, papers, or records available for examination; and

(2) where the agency head determines, after taking into account the price and availability of the property or services from United States sources, that the public interest would be best served by the omission of the clause.

If the clause is omitted based on a determination under clause (2) a written report shall be furnished to the Congress. The power of the agency head to make the determination specified in the preceding sentences shall not be delegable.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MERCK & CO., INC.,
Plaintiff,

v.

ELMER B. STAATS, Comptroller General of the United States,
Defendant,

and

THE UNITED STATES OF AMERICA,
Intervenor-Defendant.

Civil Action No. 74-1447

JUDGMENT AND ORDER

This matter is before the Court on the motion of plaintiff Merck & Co., Inc. (hereinafter "Merck") to alter or amend the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Upon consideration of plaintiff's motion, the memoranda in support and opposition thereto, and the entire record in this action, it is this 23rd day of January, 1979,

ORDERED, that the Plaintiff's Motion to Amend or Alter the Judgment is denied except to the extent it is granted in part in the following paragraphs; and it is

FURTHER ORDERED, that the judgment of this Court previously entered in this action on August 12, 1977, be amended to delete the grant of injunctive relief

against Merck and to add provisions to protect the confidentiality of Merck's records to which the Comptroller General may obtain access under the judgment; and it is

FURTHER ORDERED, that the judgment of this Court on the motions for summary judgment submitted by plaintiff Merck, defendant Comptroller General of the United States, and intervenor-defendant United States of America now read as follows:

ORDERED, that the motions for summary judgment by defendant and defendant-intervenor are granted in part and denied in part as outlined below; and it is

FURTHER ORDERED, that motion of plaintiff Merck and Co., Inc. for summary judgment is granted in part and denied in part as outlined below; and it is

FURTHER ORDERED, that the Comptroller General of the United States and his duly authorized representatives have the right to examine, on the premises of Merck, Rahway, New Jersey, and its other principal offices wherever located, at a time and date mutually agreed upon by the parties, all books, documents, papers, or records directly pertaining to the pricing and cost of producing the items furnished by plaintiff Merck under the following contracts numbered:V797P-5077(C), DSA120-74-C-0680, DSA120-74-C-1813, and DSA120-73-D-2842, including manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision), manufacturing overhead (including plant administration, production planning, warehousing, utilities and security), royalty expenses, and delivery costs; and it is

FURTHER ORDERED, that defendant Comptroller General shall not demand access to books, documents, papers, or records with respect to research and development, marketing and promotion, distribution, and administration (except to the extent such data may be included in the cost items listed above); and it is

FURTHER ORDERED, that every book, report, paper, record, and other document (all hereinafter referred to as "document"), designated as confidential by Merck or any of its divisions or subsidiaries and provided or otherwise made available to the Comptroller General or any of his successors, agents, employees, or subordinates (all hereinafter referred to as "the Comptroller General"), and every summary thereof and extract therefrom, and all data and information contained therein, including accountants' work papers (all hereinafter referred to as "data"), shall be held in confidence and shall not be provided or otherwise made available by the Comptroller General to any person or agency outside the General Accounting Office except as provided in subparagraphs (a) and (b), below. No copies of Merck's documents shall be included in accountants' work papers without the approval of Merck.

Any document and data referred to in the above paragraph shall be used by the Comptroller General solely for the purpose of a contract study. Upon completion of that study, the Comptroller General shall immediately return to Merck all documents described in that paragraph. Any data in which Merck, any of its divisions or subsidiaries, or any product manufactured or sold by any of them are or may be directly or indirectly identified which the Comptroller General deems it necessary to retain shall be retained by the General Accounting Office and deposited with and maintained by the Comptroller General under security measures to be agreed upon by the parties. Access to such data by any person shall be permitted only upon written authorization of the Comptroller General, and as limited in the subparagraphs following next denominated (a) and (b).

(a) Any of the data referred to in the above paragraph may be published, provided to, or otherwise made

available to a person or agency outside the General Accounting Office if the data are published, provided, or made available so that any direct or indirect identification of Merck, any of its divisions or subsidiaries, or any product manufactured or sold by any of them, is not reasonably possible. Merck shall be afforded a reasonable opportunity to examine and offer its comments regarding any data considered for release, including any report issued by the Comptroller General that includes such data, before release of the data or report.

(b) The Comptroller General may comply without regard to the limitations of this Order set forth above, with an official written request for any of the data referred to above submitted to him by either House of Congress, or any committee of the House of Representatives or the Senate, or any joint committee of the two Houses, having jurisdiction over the subject matter of the study referred to in the Affidavit of Gregory J. Ahart filed in this action, to the extent authorized and directed by law. The Comptroller General will cause prompt notice of any such request to be given to Merck and to this Court at least seven calendar days prior to furnishing the data requested, and it is

FURTHER ORDERED, that the Comptroller General and the United States shall notify Merck promptly of any request for disclosure, subpoena *duces tecum*, civil action, or other order or application for an order seeking production, release, or disclosure of any data referred to above, and further agree to use their best efforts to protect the confidentiality of such data, except as provided above, including resort to appropriate judicial remedies and cooperation with Merck in such efforts, and it is

FURTHER ORDERED, that the Court shall retain jurisdiction to interpret and enforce the terms of this Judgment, upon application of any party, and it is

FURTHER ORDERED, that each party shall bear its own costs.

/S/ WILLIAM B. BRYANT

UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MERCK & CO., INC.,
Plaintiff,

v.

ELMER V. STAATS,
Comptroller General of the United States,
Defendant,

and

THE UNITED STATES OF AMERICA,
Intervenor-Defendant.

Civil Action
No. 74-1447

MEMORANDUM AND ORDER

This is an action in which plaintiff Merck & Co., Inc., a New Jersey corporation that manufactures, distributes, and sells pharmaceutical products, seeks a judgment declaring that defendant Comptroller General of the United States lacks authority to examine certain records pertaining to Merck's cost structure and corresponding injunctive relief. The Comptroller claims a right to review all of plaintiff's records relating to four contracts, negotiated without advertising, for sale of pharmaceutical products to the Department of Defense and the Veterans Administration. The right, both sides agree, derives from 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), which require that the following language appear in government contracts negotiated without advertising:

> The Contractor agrees that the Comptroller General ... shall ... have access to and the right to examine

> any directly pertinent books, documents, papers, and records of the Contractor involving transactions related to this contract.

Each of the four contracts involved in this case contains such a provision.

The dispute centers on the scope of the Comptroller General's authority. Merck contends that since the contract prices were not cost based, the records the Comptroller seeks to examine do not "directly pertain" to the prices paid by the Government, and therefore are not subject to disclosure. Also, Merck contends that the purpose of these contractual provisions is to enable the Government to ensure that the prices it pays are reasonable and appropriate. Here, says Merck, the Government has no such purpose in mind but seeks instead to gain access to Merck's records in order to conduct an economic survey of the pharmaceutical industry. Defendants see matters differently. They interpret the scope of the Comptroller's authority broadly, and they demand from Merck

> all books, documents, papers, and other records directly pertinent to the contracts, which includes, but are not limited to (1) records of experienced labor costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the government, and (3) such other information as may be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests.

Defendants contend that the "survey proposed by the Comptroller is being conducted *in order to determine the adequacy of protection afforded the Government by negotiating techniques used by the procuring agencies,*" Reply Memorandum of the United States at 9 (emphasis in

original); *see also* Ahart Affidavit, para. 13; that facilitation of such a determination was one of the primary purposes underlying 10 U.S.C. § 2313(b) and 41 U.S.C. § 254(c), *see e.g.*, H.R. 2574, 97 Cong. Record 13198 (Daily ed. Oct. 15, 1951); and that persuasive authority for broad construction of the contractual provisions exists in *Hewlett-Packard Company* v. *United States*, 385 F.2d 1013 (9th Cir.), *cert. denied*, 390 U.S. 988 (1967).

Hewlett-Packard, *supra*, is the sole decision by an appellate court that interprets the statutory language involved in this case. There Hewlett-Packard had entered into several negotiated fixed-price contracts with the Department of the Air Force. As 10 U.S.C. § 2313(b) commands, each of the contracts contained a standard access-to-records clause. After performance of the contract, representatives of the Comptroller General demanded from Hewlett-Packard all records

> relating to the pricing and cost of performance, support for prices charged to the Government, and such other necessary information which would permit such Representatives to review the reasonableness of the contract prices provided for in the aforesaid contracts.

385 F.2d at 1015. Although, as here, Hewlett-Packard claimed not to consider production costs in arriving at the terms and conditions of the contracts in question, *id.* at 1016, the Court of Appeals affirmed the trial court's determination that the Comptroller's demand was entirely lawful and appropriate. The court acknowledged that the words "directly pertinent to . . . transactions related to this contract" are words of limitation—that an access-to-records clause does not permit open-ended inspection. *Id.* at 1015-1016. The court went on to say, however, that

> the word "contract," as used in the statute is intended to have a broader meaning, embracing not only the specific terms and conditions of the agreement, but

> also the general subject matter. The subject matter of these four contracts is the procurement of described property by the Government.
>
> Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs. Production costs involve transactions relating to the contract, because they encompass business arrangements made by the contractor in obtaining the materials, labor, facilities and the like required by it in fulfilling its commitment with reference to the subject matter of the contract.

Id. at 1016. Specifically, the Court of Appeals upheld the trial court's declaration that the company's costs of *direct material, direct labor and overhead in producing* the items furnished under the contracts are directly pertinent to those contracts and must be made available to the Comptroller. *Id.* at 1015.

I am satisfied that *Hewlett-Packard* accommodates governmental interest in supervising and controlling the procurement process in precisely the manner intended by Congress. *See* Senate Report 603, 82nd Congress, concerning Senate Bill 921; statement by Congressman Celler, 96 Cong. Rec. 17123, January 2, 1951. Also, I am satisfied that the survey proposed by the Comptroller in this case, *see* Ahart Affidavit, para. 11-13, will facilitate supervision of the procurement process and is within his authority. Hence I reject the restrictive approach to access-to-records clauses taken in *Eli Lilly and Co.* v. *Staats*, I P75-72-C (S.D. Ind. November 30, 1976), a post-*Hewlett-Packard* decision relied upon by plaintiff. However, I do find persuasive the further refinement of *Hewlett-Packard* in *Bristol Laboratories Division of Bristol-Myers Co.* v. *Staats*, 75 Civ. 1334 (S.D.N.Y. April 11,

1977), which, like *Eli Lilly, supra*, involved an access-to-records demand identical to the one at issue here. Comptroller access to records relating to manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision), manufacturing overhead (including plant administration, production planning, warehousing, utilities and security), royalty expenses, and delivery costs. *Bristol, supra*, Memorandum Order at 3. Bristol contended that data concerning research and development, marketing and promotion, distribution and administration (except to the extent such data relate to the cost items listed above) were too remote to be considered "directly pertinent" to its contracts with the Government. The court agreed with Bristol's position, stating:

> The specific list of items Bristol offers to make available . . . appears to reflect a responsible and reasonable effort to distinguish "directly pertinent" matter within the meaning of the access to records clause. It represents a sensible point at which to draw the line.

Id. at 8. Particularly instructive is the court's observation that,

> Although the access to records clause has its origins in statute, it is nevertheless a contractual provision. We are thus confronted with the task of construing the contract, a task which turns on the intent and understanding of the parties regarding the import of the access to records clause at the time the contracts were entered. The government's position [which the court saw as open-ended] is particularly unrealistic when viewed in this light. It is inconceivable that Bristol, or any contracting firm, could have understood this clause to authorize the sweeping power of inspection claimed by the GAO.

Id. at 6-7. These principles, taken together with those enunciated in *Hewlett-Packard*, have guided me in construing the contracts at issue in this case. The line drawn by the *Bristol* court appears to me a realistic interpretation of the intent of the parties in this case as well.

For these reasons it is this 11 day of August, 1977.

ORDERED, that the motions for summary judgment by defendant and defendant-intervenor are granted in part and denied in part as outlined below; and it is

FURTHER ORDERED, that plaintiff Merck and Co., Inc.'s motion for summary judgment is granted in part and denied in part as outlined below; and it is

FURTHER ORDERED, that the Comptroller General of the United States and his duly authorized representatives have the right to examine all books, documents, papers, or records directly pertaining to the pricing and cost of producing the items furnished by plaintiff Merck under the following contracts numbered: V797P-5077(C), DSA120-74-C-0680, DSA120-74-C-1813, and DSA120-73-D-2842, including manufacturing costs (including raw and packaging materials, labor and fringe benefits, quality control and supervision), manufacturing overhead (including plant administration, production planning, warehousing, utilities and security), royalty expenses, and delivery costs; and it is

FURTHER ORDERED, that defendant Comptroller General shall not demand access to books, documents, papers, or records with respect to research and development, marketing and promotion, distribution, and administration (except to the extent such data may be included in the cost items listed above); and it is

FURTHER ORDERED, that plaintiff Merck, its officers, agents, servants, attorneys, employees and all persons in active concert or participation with them who receive actual notice of an order by personal service or otherwise, are enjoined from preventing the duly authorized representatives of the Comptroller General of the United States from obtaining access to and examining records authorized above; and plaintiff Merck, including its officers and subordinates, is directed to have available on the premises of Merck, Rahway, New Jersey, and its other principal offices wherever located, such books and records at a time and date mutually agreed upon by the parties; and it is

FURTHER ORDERED, that this case be, and hereby is, dismissed.

/S/ WILLIAM B. BRYANT

JUDGE